

REMARKS/ARGUMENTS

This Amendment is being filed in response to the Final Office Action dated January 27, 2010. Reconsideration and allowance of the application in view of the amendments made above and the remarks to follow are respectfully requested.

Claims 17-30 are pending in the Application. Claims 27-29 are withdrawn from consideration. Claims 17 and 30 are independent claims.

In the Final Office Action, claim 17-26 are rejected under 35 U.S.C. §112, second paragraph. In response, claims 17 and 30 are amended herewith to address the concerns raised in the Final Office Action. No new matter is added by this amendment to claims 17 and 30. The amendment to claims 17 and 30 is not intended to narrow the scope of the prior claims and is merely submitted to further prosecution of this matter and to either promote allowance of the claims or at least, reduce pending issues and place claims 17-26 and 30 into a better condition for appeal. Accordingly, consideration and entrance of the amendment to claims 17 and 30 is respectfully requested. It is respectfully submitted that the explanation provided above and the amendment to claims 17 and 30 overcomes the 35 U.S.C. §112, second paragraph rejection and an indication to that effect is respectfully requested.

In the Final Office Action, claims 17, 18, 20-22, 24, 25 and 30 are rejected under 35 U.S.C. §103(a) over U.S. Patent No. 5,660,170 to Rajan ("Rajan") in view of U.S. Patent No. 5,134,995 to Gruenke ("Gruenke"). Claims 19 and 26 are rejected under 35 U.S.C. §103(a) over Rajan in view of Gruenke and further in view of U.S. Patent No. 5,551,419 to Froechlich ("Froechlich"). Claim 23 is rejected under 35 U.S.C. §103(a) over Rajan in view

of Gruenke and further in view of U.S. Patent No. 5,868,133 to DeVries ("DeVries"). These rejections are respectfully traversed. It is respectfully submitted that claims 17-26 and 30 are allowable over Rajan in view of Gruenke alone and in view of any combination of Froechlich and DeVries for at least the following reasons.

In the paragraph spanning pages 3 and 4, the Final Office Action acknowledges that Rajan is silent about "determining an average intrinsic positive end-expiratory pressure over the monitored plurality of breathing cycles" as recited in claim 17. Yet the Final Office Action, in a Response to Arguments section at page 7, argues that Rajan statement (emphasis added) "monitoring the flow rate of several inspiration pulses" at col. 6, lines 46-52 means "over numerous cycles". This position is respectfully traversed. The full excerpt of the quoted paragraph of Rajan states (emphasis added):

As shown in FIG. 2 several identical inspiration pulses 18, 20 and 22 can be delivered in a sequence when determining the opening pressure. When delivering several identical inspiration pulses 18, 20 and 22, the measured respiratory gas flow is averaged. The calculated average flow is then utilized in determining the opening pressure.

It is respectfully submitted that nothing in this section suggests that monitoring or measuring is of a plurality of breathing cycles". First, each of the several identical inspiration pulses 18, 20 and 22 of Rajan are only a part of the respective breathing cycle. In Rajan, the antecedence basis for what is meant in the term "the measured respiratory gas flow" in the above cited paragraph of Rajan is found at col. 5, line 66 to col. 6, line 4 which states that "[t]he measured values are supplied to a control unit 14, which calculates an opening pressure" and further "maintaining a pressure to keep the lungs open". Nothing

in that description or elsewhere in Rajan teaches, discloses, or suggests "determining an average intrinsic positive end-expiratory pressure over the monitored plurality of breathing cycles" as recited in claim 17.

This alone should be sufficient to find that Rajan and Gruenke fail to render independent claims 17 and 30 obvious. However, claim 17 has further recitation that is not addressed by the Final Office Action. Claim 17 recites that in addition to being configured to "determine", the controller is also configured to "control the gas flow generating system based on the determined average intrinsic positive end-expiratory pressure such that a pressure of the flow of gas delivered to the subject during at least a portion of an expiratory phase of a breathing cycle substantially corresponds to the average intrinsic positive end-expiratory pressure." Rajan and Gruenke do not teach, disclose, or suggest controlling any portion of an expiratory phase of the breathing cycle to correspond to the average intrinsic PEEP.

Thus, it is respectfully submitted that the apparatus of claim 17 and the method of claim 30 are not anticipated or made obvious by the teachings of Rajan and Gruenke. For example, Rajan in view of Gruenke does not teach, disclose or suggest, an apparatus that amongst other patentable elements, comprises (illustrative emphasis added) "a monitor configured to monitor a characteristic associated with intrinsic pressure of a plurality of breathing cycles of the subject and to store the monitored characteristic as characteristic output; and a controller configured to determine an average intrinsic positive end-expiratory pressure over the monitored plurality of breathing cycles based on the characteristic output of the monitor, and control the gas flow generating system based on the determined

average intrinsic positive end-expiratory pressure such that a pressure of the flow of gas delivered to the subject during at least a portion of an expiratory phase of a breathing cycle substantially corresponds to the average intrinsic positive end-expiratory pressure" as recited in claim 17 and as substantially recited in claim 30.

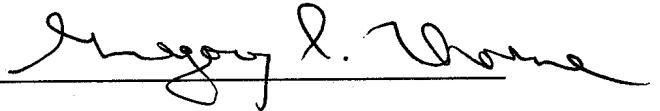
Froechlich, and DeVries are introduced for allegedly showing elements of the dependent claims and as such, do nothing to cure the deficiencies in each of Rajan and Gruenke.

Based on the foregoing, the Applicant respectfully submits that independent claims 17 and 30 are patentable and notice to this effect is earnestly solicited. Claims 18-26 respectively depend from claim 17 and accordingly are allowable for at least this reason as well as for the separately patentable elements contained in each of the claims. Accordingly, separate consideration of each of the dependent claims is respectfully requested.

In addition, Applicant denies any statement, position or averment of the Examiner that is not specifically addressed by the foregoing argument and response. Any rejections and/or points of argument not addressed would appear to be moot in view of the presented remarks. However, the Applicant reserves the right to submit further arguments in support of the above stated position, should that become necessary. No arguments are waived and none of the Examiner's statements are conceded.

Applicant has made a diligent and sincere effort to place this application in condition for immediate allowance and notice to this effect is earnestly solicited.

Respectfully submitted,

By 

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